In the Supreme Court
OF THE
United States

OCTOBER TERM, 1936

No. 505

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY (a corporation),
Petitioner,

vs.

WILLIAM W. SCARLETT,
Respondent.

BRIEF FOR RESPONDENT.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is not yet officially reported. It is unofficially reported in 60 Pac. (2d) 462. [Also R. 210.]

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered August 7, 1936. (R. 210.)

Petition for certiorari was filed November 2, 1936, and granted December 7, 1936.

Jurisdiction, if present, must come from Section 237 of the Judicial Code as amended.

STATUTES INVOLVED.

The statutes involved are:

1. Federal Safety Appliance Act of 1910 (36 United States Statutes 298; U.S.C.A. Title 45, Sections 11 to 16); (27 United States Statutes 532; U.S.C.A. Title 45, Section 7); (35 United States Statutes 65; U.S.C.A. Title 45, Section 54).

2. Federal Employers' Liability Act, 35 United States Statutes 65; U.S.C.A. Title 45, Section 51.

STATEMENT OF THE CASE.

Respondent, a railroad brakeman, in the employ of petitioner railway company, while both were engaged in interstate commerce, in climbing down the side ladder, on a freight car of petitioner's train, at night in the performance of his duties, fell from the ladder, by reason of his right foot coming in contact with a round slanting, diagonal brace rod, extending outward from the car wall and inserted between the side wall of the car and the rungs and uprights of the ladder and behind the same and suffered the injuries for which the jury awarded him a verdict. The distance from the side of the box car to the inside of the

diagonal brace rod was 7/8 of an inch; the diameter of the brace rod was 1 1/8 inches; the distance from the outside of the brace rod to the inside of the rungs of the ladder was 2 3/4 inches. (R. 16.) The rungs or treads of the ladder were attached to the outer surface of the stiles or uprights; while the distance from the treads to the brace rod was 2 3/4 inches, there was but a fraction of an inch between the inner surface of the stiles and the outer surface of the brace rod. [See Plaintiff's Exhibit 3, R: 174.) The angle or slant of the brace rod from the perpendicular was 45 degrees. The brace rod was first introduced by petitioner in 1929 and petitioner is the only railroad using this type of rod behind side ladders. (R. 36, 51.) It was admitted that there were many ways in which the bracing effect could be accomplished, without using the particular type of rod here in use. (R. 48.) The universal method of bracing cars by other railroad companies is by the use of flat braces not standing out into space and not obstructing free movement of the brakemen ascending and descending side ladders. (R. 49.) A number of witnesses, including experts, testified for respondent that the ladder as placed with the diagonal brace rod between the wall and the ladder uprights was unsafe and dangerous in use to the men using the same. (R. 118 to and including R. 127.) The jury, itself, inspected a freight car equipped with similar ladder and rod. (R. 129.) Photographs thereof were introduced in evidence. (Plaintiff's Exhibit 2, R. 173; Plaintiff's Exhibit 3, R. 174.) The primary purpose of the diagonal brace rod was to brace the car and it was designed for that purpose

alone. (R. 47.) No other factor was given consideration by the carrier except compliance with the Interstate Commerce Commission's requirements as to clearance of treads. (R. 48.)

SUMMARY OF ARGUMENT.

The Safety Appliance Act of 1910 here involved, was two fold in purpose. By Section 2 thereof, the carrier was required at all times thereafter to maintain certain secure and efficient equipment, including ladders, for use of employees. By Section 3 of the Act, Congress vested in the Interstate Commerce Commission, authority to prescribe rules and regulations, so as to insure uniformity of equipment. Section 3 was not intended to, nor did it, limit the general all embracing liability imposed by Section 2, to, at all times, provide and maintain secure and safe ladders and other equipment. Congress intended by Section 3, not to limit or circumscribe the liability imposed by Section 2, but to provide a further and additional element or measure of safety, to-wit, uniformity of equipment. In effect, Congress said to the carrier: "Not only is there a danger to your employees arising from insecure or unsafe equipment, but also there is existent an ever present danger arising from ladders and other equipment, which, although separately and individually secure, yet, by reason of placement, dimensions and space being different and varying upon the rolling stock, the employees required to use the same under all conditions of weather and time, con-

front danger because of uncertainty as to the type, dimensions and placement of affixation of equipment on cars." Therefore, said Congress, to the carrier, "there is imposed upon you, not only a primary and ever continuing duty to, at all times, provide safe and secure equipment, but in addition you will have the added liability of complying with such regulations and rules as the Interstate Commerce Commission may devise for uniformity of your equipment". It follows therefore that since 1910, the carrier had a two fold responsibility.

a. At all times, to provide safe equipment.

b. To provide uniformity of equipment as directed by the Interstate Commerce Commission.

For a violation of each of these duties, liability exists.

If a ladder, in and of itself, is not safe in any respect not covered by Commission regulation, the carrier is responsible.

If a ladder, in and of itself, is safe and secure, but violates the rule of the Commission as to uniformity, the carrier is responsible, and, a fortiori, if it is both unsafe and violative of a uniformity requirement, the carrier is responsible.

The issue here was not, whether the carrier violated any requirement of the Interstate Commerce Commission. The matter of obstruction in, about and in connection with the use of ladders, was not a matter covered by any regulation of the Commission. Under Section 2, the carrier being at all times required to

furnish and provide a safe and secure ladder, it follows, that violation of this primary duty entailed liability under the Act. The California Supreme Court correctly held this latter question was one of fact for the jury's determination under all the circumstances. Ample evidence justified the jury in finding the ladder unsafe.

The diagonal brace rod was part of the ladder, and hence if it was unsafe, the ladder was unsafe and the carrier is responsible.

The ladder consisted of more than the treads (or cross bars) and the uprights. The side wall of the car was also necessarily a part of the ladder. Hence any obstruction between the side wall and the uprights and treads, as was the diagonal brace rod here, making the ladder unsafe in use, constituted the ladder unsafe under the Act. Notwithstanding that the *purpose* of the carrier in inserting the brace rod as a part of the ladder was to strengthen the car, if its *effect* was to make the ladder unsafe and insecure in use, the ladder thereby became an insecure and unsafe ladder under the Act.

No presumption of approval by the Interstate Commerce Commission of this type of ladder with brace rod obstruction, arises by reason of failure of the Commission to enact regulations forbidding the same.

The regulations of the Interstate Commerce Commission with respect to ladders, read in their entirety, that is, both the language of the regulations and the plats and diagrams which are a part thereof, show that no obstructions shall exist between the rungs and

uprights of a ladder and the side wall of the cars. It therefore follows, either that there was a violation of the regulation in that regard or that the Commission did not cover the subject matter of such obstructions, in which event liability exists by virtue of violation of Section 2 of the Act.

ARGUMENT.

I.

THE LADDER WAS NOT SECURE, EVEN THOUGH COMPLYING WITH A COMMISSION REGULATION AS TO CLEARANCE OF TREADS FOR THE REASON THAT IN OTHER UNREGULATED ASPECTS, THE LADDER WAS INSECURE AND THUS VIOLATIVE OF THE ACT.

Petitioner has argued its case upon the theory that it escapes liability by a showing of compliance with the regulations of the Interstate Commerce Commission, even though it appear that the ladder was insecure and unsafe for use, in a respect, or respects, not covered by Interstate Commerce Commission regulation.

Petitioner rests this argument upon the theory that whatever duty or responsibility was created by the requirement of the Safety Appliance Act, as to secure appliances, is limited and circumscribed by such regulations as may be enacted by the Commission and therefore compliance with such regulations as were enacted in spite of the existence of unregulated defects in appliances, is a full discharge of the liability of the carrier under the Safety Appliance Act.

In effect, petitioner contends, that from the moment that any regulations were enacted by the Commission,

no matter how limited or fragmentary in character, thereafter the carrier need only show compliance therewith. If such be the case the Commission would in reality have the power of limiting and in fact of nullifying the essential purpose of Safety which was the essence of the Act. If such be the case, Congress, by delegating power to the Interstate Commerce Commission in accordance with Section 3 of the Act, has granted to the Commission the power to limit and in fact nullify the provisions of Section 2 of the Act.

This theory of petitioner is untenable. It violates the purpose and intent of Congress and the language of the Act and is not sustained by judicial authority. An investigation of the purpose and intent of the Congress in the passage of the Act of 1910, will in the first instance conclusively demonstrate the invalidity of petitioner's argument.

A. Reports of House Committee indicate a congressional intent directly opposite to that contended for by petitioner.

The Safety Appliance Act was first introduced in the 60th Congress, Second Session, passed by the House but not by the Senate. [H. R. 26725.] It was subsequently introduced in the 61st Congress, Second Session [H. R. 5702] and as a result of a conference committee report, it was adopted by both houses and signed by the President. As passed by the 61st Congress, Sections 2 and 3 were substantially the same as when introduced in the 60th Congress. The Committee member in charge of the bill at the 61st Congress, Mr. Townsend, referred to the Committee Report and Explanatory remarks by himself as com-

mittee member in charge of the bill, when offered in the 60th Congress, as being the motivating reasons for these sections of the Act, when introduced at the 61st Congress.

The Committee report and explanatory remarks of the Sponsor at the 60th Congress indicate the purpose and intent of both Sections 2 and 3 of the Act, namely, that Section 3 was not intended to either minimize, restrict or nullify the fundamental purpose of Section 2 of the Act. (See Congressional Record, 60th Congress, 2nd. Session, Vol. 43, page 2404.)

Mr. Townsend, the Committee member in charge of the bill, being questioned as to the purposes of the bill, the following colloquy ensued:

"Mr. Ellis, of Missouri. I want to call the gentleman's attention to the last proviso at the end of Section 3.

Mr. Townsend. Yes.

Mr. Ellis of Missouri, continuing: Conferring upon the Interstate Commerce Commission the power to modify the requirements of this section, by extending, the period and so forth.

Do we understand by that they would have the power to modify these requirements so as to change the appliances that might be prescribed by the measure?

Mr. Townsend. We make no provision as to any particular kind of appliance, only that they shall be safe. Now, the power of determining must be left with the Commission, otherwise, it would not be able to prescribe what might afterwards be found to be a

better device or method. Furthermore it should be discretional with it to give the railroads more time in which to equip their cars. That is but discretionary with the Commission.

Mr. Ellis of Missouri. I can readily see that an extension of time might be permitted but the question is, whether you leave the power in the Commission to really nullify the provisions of your bill.

Mr. Townsend. No."

Furthermore the Committee report in favor of the bill at the 61st Congress, contains language clearly indicating the same intent and purpose. [Cong. Record 61st Congress, 2nd. Session, Vol. 45, pages 160, 161, 4216, 4217; Senate Report No. 250.]

Mr. Townsend, the House Committee member in charge of the bill presenting his report, was questioned and made the following explanatory remarks:

"Mr. Townsend. It is a fact that while the law of 1893 provided for certain grab irons and hand holds on cars, it did not provide for any uniformity of their attachment to the cars. * * *

It is a fact that while there has been an effort on the part of railroad organizations and master car-builders associations to arrive at some kind of uniformity in the equipment of cars with these appliances, up to date they have not been able to agree. It is a fact that almost every freight train on almost every road contains cars equipped in several ways, so that the brakeman, switchman or other employees who have use for these appliances are not able to determine on a

dark night or under unusual circumstances just where these attachments are.

Mr. Hammond. Is it provided by this law that there shall be appliances of the same character or of the same make used by the various carriers?

Mr. Townsend. No sir, it does not; it provides that there shall be safety appliances *and* that they shall be attached in a uniform manner. To illustrate this provision, the sill step will be one of like character as all others employed, attached at the same place on the car.

Mr. Hammond. They (referring to the Commission) might attempt under this bill to designate the particular kind of appliance to be used. * * *

Mr. Townsend. I think not. It does not give the Commission any power to determine the kind of appliance, but only to determine upon the method of attachment of these safety appliances." [Cong. Record 61st Congress, 2nd Session, Vol. 45, pages 160-161.]

This Court has held that Reports of a Committee of the House or Senate "may be regarded as an exposition of a legislative intent, in a case where otherwise the meaning of the Statute is obscure" and that "this has been extended to include explanatory statements in the nature of a supplemental report made by a Committee member, in charge of a bill in course of passage."

Duplex Printing Press v. Deering, 254 U. S. 444; 65 L. ed. 349.

B. The language of the statute itself shows the same clear legislative intent as is found in the congressional proceedings.

Section 2 of the Act as passed by Congress in 1910 provides as follows:

> "That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: Provided, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose."

Section 3 of the Act, provides as follows:

> "That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety three and shall give notice of such designation to all common carriers subject to the provisions of this Act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Com-

mission shall remain as the standards of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; *and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act:* Provided, that the Interstate Commerce Commission may, upon the full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the Commission."

The clause of Section 3 of the Act, to-wit: "Failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a *like* penalty as failure to comply with *any requirement of this Act*" (italics ours), subjecting the carrier to a *like* penalty for failure to comply with a regulation of the Interstate Commerce Commission, is irrefutably per-

suasive that Congress was intending to raise the regulations of the Commission to an equal dignity with the Act itself, but *not* to supercede the Act in any manner. In other words, Congress regarded the dangers resulting from lack of standardization and uniformity as being so important, as to require the infliction of a penalty for a violation of equal gravity with the penalty prescribed for violation of Section 2 itself. The matters covered, however, by Section 3, were in a different category or class and obviously the language of the Act itself therefore shows no desire on the part of the law makers, by Section 3, to limit, circumscribe or supercede the fundamental safety provision of Section 2.

C. The decisions of this Court and other judicial pronouncements are to the same effect.

This Court in *Ill. Central Ry. v. Williams*, 242 U. S. 463, 61 L. ed. 437, passed on the question as to whether or not, the order issued by the Interstate Commerce Commission on March 13, 1911, under the authority contained in Section 3 of the Act, suspended the provisions of Section 2 of the Act, during the interim allowed the carriers by the Commission for compliance with its regulations.

This Court held that Section 2 of the Act was in full force and effect, from the time of its enactment, irrespective of any delay granted by the Commission to the carriers to fulfill the requirements of the Commission's regulations.

> "The congressional purpose in enacting § 2 of the act is very plain. At the time the act was

passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative, duty, of making them 'secure' and to enforce this duty by appropriately severe penalties. Chicago B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582, 31 Sup. Ct. Rep. 612.

It is equally clear that the purpose of the 3d section is to require that the safety appliances 'provided for by §2 of the act' shall ultimately conform to a standard to be prescribed by the Interstate Commerce Commission; that is, that they shall be standardized, shall be of uniform size and character, and, so far as ladders and handholds are concerned, shall be placed as nearly as possible at a corresponding place on every car so that employees who work always in haste, and often in darkness and storm, may not be betrayed, to their injury or death, when they instinctively reach for the only protection which can avail them when confronted by such a crisis as often arises in their dangerous service. * * *

This reading of the two sections makes them stand together as an expression of a consistent congressional purpose 'to promote the safety of employees and travelers on railroads' on and after July 1st, 1911, by requiring that the safety appliances described in § 2 of the act shall be secure and efficient from that date, and by requiring, as § 3 provides, that these appliances shall be brought

as speedily as may be to a uniform standard of location, size, and usefulness, to be prescribed by the Interstate Commerce Commission."

Ill. Cent. R. R. v. Williams, supra.

While the precise question before this Court in the *Williams* case, is not the precise question here involved, yet the *Williams* case decides the fundamental principle involved, namely, that Section 2 of the Act, from the date of its enactment, at all times, obligated the carriers to maintain safe appliances, irrespective of regulations made or not made by the Commission on the subject of uniformity or standardization. Obviously, if the sole issue raised in this case was an alleged default of the carrier in violation of a specific regulation of the Interstate Commerce Commission, the above prineiple would not be apropos; but where, as here, the issue is the violation of Section 2 of the Act, to-wit, the failure to maintain a safety appliance in a respect not covered by Commission regulation, the principle decided by this Court in the *Williams* case, supra, is applicable and determinative of this case. In the *Williams* case, Mr. Justice Clark, favorably commented upon a similar analysis of Sections 2 and 3 of the Act, made by the Supreme Courts of Minnesota and Iowa, in the cases respectively of *Coleman v. Ill. Central Ry.,* 132 Minn. 22, 155 N. W. 763; and *Cook v. Union Pacific Ry.,* 158 N. W. 521. The following language from *Coleman v. Ill. Central Ry.* is applicable:

"Congress intended that section 2 to be a part of the statute, and the clear language thereof can-

not be rejected, or held inoperative pending the installation of the standard of equipment to be ordered by the Commission without running counter to the main purpose of the act. The section must therefore stand, as a part of the statute, and be construed as imposing the duty upon railroads of maintaining their car equipment in secure and safe condition for use after July 1, 1911. Section 3 must be construed as a requirement of a uniform standard for such equipment, and that the extension of time within which to conform thereto has no reference to, and does not relieve from, the duty to maintain present equipment in secure and safe condition."

Coleman v. Ill. Cent. R. R., supra.

The following language from *Cook v. Union Pacific* is applicable:

"Concede that they were not required to have standard handholds at the time of the accident, this is no defense to a charge that it failed to comply with the requirements of section 2 which required a handhold at the top of the ladder on the roof of the car, securely fastened. The record discloses, and the contention is, that it did have a handhold on the roof of the car at the top of the ladder, but that this handhold was not securely fastened as required by this section. The basis of the claim is that it had a handhold on the roof of the car at the top of the ladder, but that this handhold was insecure, and was the proximate cause of decedent's fall to his death. It was required to have such a handhold on the top of its cars from and after the 1st of July, 1911.

If it failed in this, it failed in its duty, although not required, at the time of the accident, to have it of standard make."

Cook v. Union Pacific, supra.

In passing upon a question arising under the Boiler Inspection Act, also a Safety Appliance Act, this Court in the case of *Baltimore & Ohio Ry. v. Groeger,* 266 U. S. 523, 69 L. ed. 419, although reversing the District Court and the Circuit Court of Appeals upon other grounds (288 F. 321) approved the declaration of the Circuit Court of Appeals to the effect, that a failure of the Interstate Commerce Commission, to make a rule or regulation concerning every defective condition or construction within the meaning of Section 2 of the Boiler Inspection Act, did not relieve the carrier from complying with the provisions of that section itself, and, in that regard, this Court said:

"But we agree with the Circuit Court of Appeals, that under Section 2 of the Statute, there was sufficient evidence to sustain the verdict wholly apart from the broken stay bolts. This duty to have the boiler in a safe condition to operate, so that it could be used without unnecessary peril to its employees, was absolute and continuing. * * *

* * * The jury was by the charge authorized to find that the act required defendant to have a fusible plug in the crown sheet of the boiler. *There is nothing in the act or in any rule, regulation, or order authorized by it, which specifies the use of fusible plugs. This, however, does not re-*

lieve the defendant of the duty to have and keep its boilers safe for use, as required by the act."
Baltimore & O. R. Co. v. Groeger, 266 U. S. 529; 69 L. ed. 424.

In *Roberts Federal Liability of Carriers,* Vol. 2, 2nd edition, page 1035, the author states, as to the purpose of Congress in the enactment of Sections 2 and 3 of the Act,

> "the orders of the Interstate Commerce Commission, *supplement but do not displace* the statute from which their authority is derived. In fact, it would seem that appliances may be constructed and used in strict compliance with the requirements of an order of the Commission and still fall short of the standard fixed by the Statute. * * * Much less can it be said, that the omission of the Commission to indicate an approved mode of construction, for a given appliance, gives the carrier carte blanche to use such type of appliance as happens to suit its convenience. In such a case, on the contrary, the railroad is thrown back upon the primary general duty stated by the statute itself."

The California Supreme Court in the instant case, after reviewing the authoritiese stated:

> "where the Commission has not made a rule in regard to a particular matter, the test is whether the appliance is safe or secure within the meaning of the statute, and this question is properly submitted to the jury. It should not be held that because the Commission has failed to regulate a particular matter, that the carrier is relieved

from the liability imposed by statute to supply an appliance which is secure and safe as to that detail."

Following the same principle see:

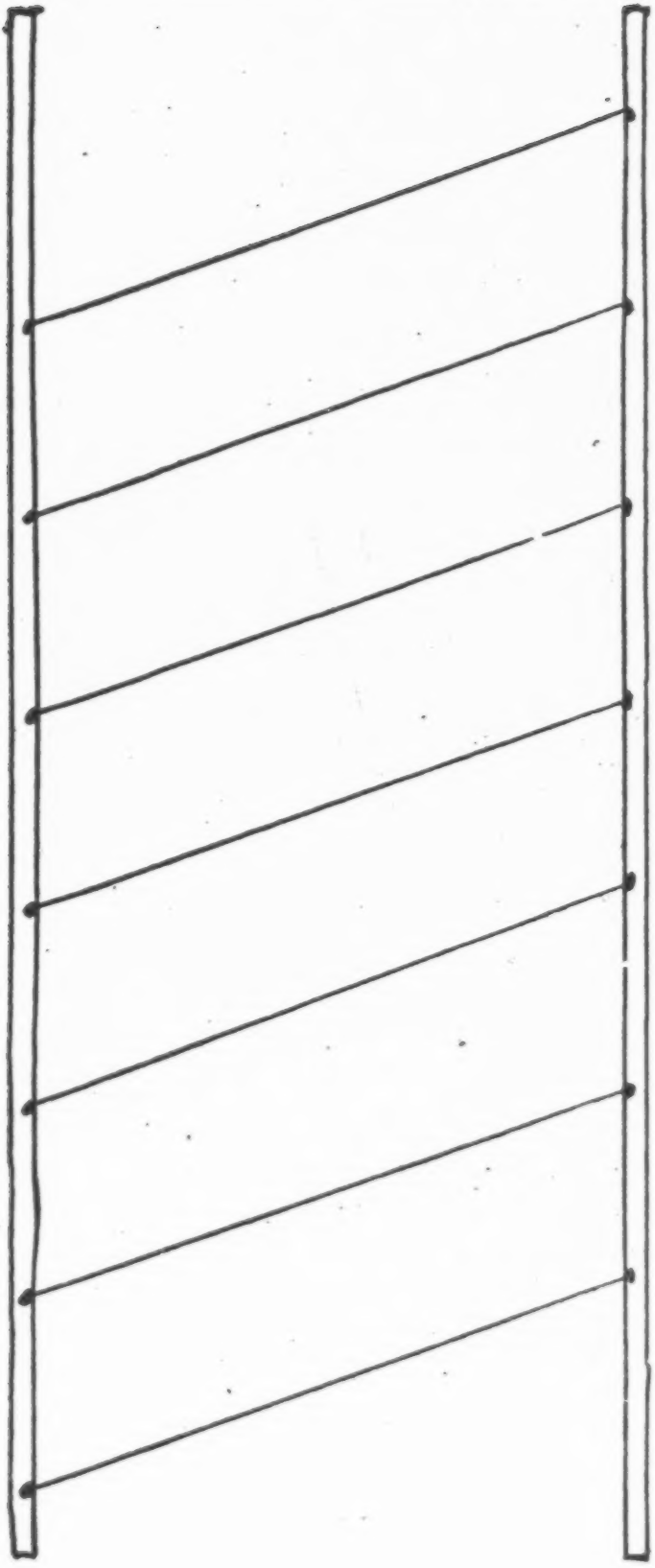
Gerow v. Seaboard Airline Ry., 128 S. E. 345;
Davis v. Reynolds, 280 Fed. 366.

That the Interstate Commerce Commission, in fact, made no rule or regulation, covering the defect in the ladder in this case, is not difficult to demonstrate.

The order of the Commission of March 13, 1911 confined itself with respect to side ladders, to the following considerations:

1. Length of treads.
2. Spacing between ladder treads.
3. Location of top ladder tread.
4. Uniformity of spacing between treads.
5. Distance from bottom tread of ladder to top tread of sill step.
6. Coincidence of end ladder treads with side ladder treads.
7. Dimensions of treads, i. e., diameter.
8. Clearance of treads.
9. Location of ladders on car.
10. Manner of affixation, as to bolts and rivets.

The foregoing subject matters of regulation obviously resulted from the requirement of uniformity and standardization. Clearly there are other important items involved in ladder construction, not concerned



with the question or problem of uniformity, not covered by the regulations and which can and do involve insecurity and danger to employees.

Many such examples can be given. In the first place, the particular brace rod here involved. Again by way of example, the regulations do not prescribe the material to be used in the construction of the treads or stiles. Again, no regulation as to the nature, type or condition of the wall to which the ladder is affixed. Again, no requirement that the treads of the ladder should be horizontal. Would a ladder wherein the treads were constructed of *glass* be *secure* under the terms of the Act? If compliance with the regulations is the sole test, it would be. Would a ladder affixed to a rotten and worm-eaten side wall of a car be secure? Obviously it would not, even though complying with the uniformity requirements of the Commission.

Opposite this page, we present a rough drawing of the uprights and treads of a ladder. It conforms in every respect to the requirements of the Commission. Assume that it has the proper length of tread, uniform spacing between the treads, proper diameter of treads, proper clearance of treads, and is properly located and affixed to the side wall of the car. Yet, because the treads are not horizontal (which is *not* required by the Commission) the ladder is obviously an insecure appliance, and would present untold danger to every brakeman of the Santa Fe R. R. Co. How could a brakeman go up and down a ladder affording such insecure footing? Yet in effect, the so-called diagonal brace rod here involved, presents exactly the

same type of danger as would confront a brakeman attempting to use the ladder in the diagram. Added to which is the additional demerit of lack of uniformity, which is the fundamental motive underlying the Commission's regulations.

The majority of petitioner's citations are from cases in which the sole *fact at issue* (not the case here), was whether or not the appliance in question conformed to the rules and regulations of the Commission and therefore the full test to be applied was the rule or regulation itself. This is particularly true with respect to the case of *Ford v. N. Y. and N. H. and H. R. R.*, 54 Fed. (2d) 342, especially relied upon by petitioner.

Respondent therefore respectfully contends that the language of the Act itself, the intention of Congress as found in its records, and the decisions of this and other courts, completely establish the principle that from and after the passage of the Safety Appliance Act in 1910, at all times, there rested upon the carrier, a full and continuing duty to provide safe appliances and further that the failure or omission of the Interstate Commerce Commission under the authority of Section 3 of the Act to provide regulations, concerning any specific device, with respect to its uniformity or standardization, has never provided any excuse for failure of the carrier to comply with the fundamental duty imposed by Section 2.

II.

THE DIAGONAL BRACE ROD AS INSTALLED, BECAME A PART OF THE LADDER IN ITS USE AND RENDERED THE LADDER INSECURE IN VIOLATION OF THE SAFETY APPLIANCE ACT.

Petitioner contends that the diagonal brace rod is not a part of the ladder, that it was installed for purposes of bracing, that it has no connection with the ladder, and that therefore, even though it would create danger for employees, respondent lacked right in this action for the reason that any claim of respondent would rest upon the ground of negligence of the carrier, not an issue here, and hence no right of action for violation of the Safety Appliance Act.

This contention will not stand analysis. The Interstate Commerce Commission's regulations re ladders were adopted in 1911. Petitioner installed the diagonal brace rod eighteen years thereafter in 1929. No other railroad in the United States has ever, at any time, used that type of rod. Petitioner's designer admitted no other factor, except that of bracing the car, was given consideration in adopting and installing the rod. Can it be logically contended that a carrier may install a device designed for another purpose, between the side wall of a freight car and the stiles of a side ladder and confine its consideration solely and entirely to whether or not it thereby obtains added bracing results for the car? No better argument that the brace rod became a part of the ladder, can be urged than the reasoning of the Supreme Court of the State of California on this subject, which we quote as follows:

"Appellant contends that as the issues on the trial were narrowed to the question of violation of the safety appliance act, i. e., to the sole question of whether the safety appliance—the side ladder—was defective, the above holding is unsound because the offending member (the brace rod) was no part of the safety appliance (the side ladder). Appellant states that the brace rod was an entirely separate device installed to add strength to the end of the box car and that if it was the cause of the injury to plaintiff, then his remedy was an action based on common law negligence, not an action for violation of the safety appliance act in the maintenance of an insecure ladder. Thus there arises a question not discussed in our former opinion, to-wit: Was the dangerous device (the brace rod) a part of the safety appliance (the side ladder)? In other words, what constitutes the side ladder of a railroad box car? Are the component parts of the side ladder merely the two uprights and the cross bars, or rungs? If that were the case, in order to render a ladder secure and safe for the purposes of its intended use, it would merely be necessary to see that the uprights and rungs were without defect. For example, such a ladder might be so insecurely bolted to loose side boards of a box car as to practically waive in the breeze yet under the limited view contended for by appellant, the ladder, having rungs and uprights without defect, would be 'secure'. The only logical conclusion is that the term 'secure ladder' as used in the act and applied to a side ladder of a box car, includes security of the complete appliance as finally installed; that is, it refers to security of the rungs and uprights or front of the

ladder, the bolts which hold it in place, that portion of the side wall of the car which serves as the back of the ladder and the clearance space behind and around the ladder necessary to its safe use. The act contemplates not only that an appliance shall be without defect or secure as to its construction but also that it shall be secure in matters pertaining to its location, installation, maintenance and intended use.

There is no confusion with respect to the alleged cause of plaintiff's injury. He does not claim to have been injured by a defective device other than the ladder, i. e., a defective brace. His sole and only claim is that there was inserted between the front and back of the ladder a slippery rod which rendered the ladder unsafe. The ladder itself was the appliance which was unsafe in use, not the brace rod. And the reason the ladder was insecure was that the round rod had been so inserted in back of it as to create a hazard, despite the existence of the clearance specified by rule. It is obvious that the injection of a foreign article which is no part of an appliance would be as likely to render the appliance insecure as a direct defect in the appliance itself. To borrow from an illustration of appellant's counsel, suppose there had been installed instead of a smooth rod, a rod with sharp pointed spikes protruding therefrom. Could it be said that the mere existing of the specified clearance between the pointed ends of the spikes and the rungs of the ladder, would meet the requirement to maintain a secure ladder? We are of the view that the jury in this case was justified in concluding that the round rod as installed in the space between the front and back of this

particular ladder rendered it insecure in violation of said safety appliance act."

Scarlett v. Atchison, etc., 60 Pac. (2d) 462. [R. 210.]

Furthermore, it must be kept in mind that the side ladder of a freight car is not movable. It is not extended in thin air. It is a part, and a component part, of the side wall of the car. Employees must use it exactly as it is, bolted and fastened to the wall of the car, with the wall of the car serving as the back of the ladder. It cannot be moved from place to place and adjusted to serve the needs of the employee called upon to make use of it. The employee must ascend and descend the ladder in all phases of railroad operations. Every element making up and being a part of the ladder in its use by employees must be secure. Any part or element of a ladder in its use, which is insecure, necessarily makes the entire ladder insecure. A ladder cannot be safe and secure in one of its parts and insecure in another without making the entire device dangerous and insecure for use.

This Court, as well as other Federal and State Courts, has followed the rule, that a failure *in use* is proof of defect.

Swinson v. Chicago, St. Paul, Minn. R. R., 294 U. S. 259; 79 L. ed. 1041;

Minn. R. R. v. Gotschall, 244 U. S. 66;

Louisville & Nashville v. Layton, 243 U. S. 617;

Davis v. Reynolds, supra;

Didinger v. Penn. R. R., 39 Fed. (2d) 798;

Phila. R. R. v. Auchenback, 16 Fed. (2d) 550;
B. & O. v. Metzler, 143 N. E. 707;
McDonald v. Great Northern R. R., 207 N. W. 194;
Frye v. Chicago R. R., 195 N. W. 629.

The record contains ample evidence in support of the finding of the jury that this ladder was in fact insecure and unsafe, and the Supreme Court of the State of California so held:

> "The jury viewed a freight car with a ladder of the construction shown in the instant case. Photographs of ladders of this type, and of other ladders appear in the record. We are of the view that the jury was justified in its decision that this bar constituted a hazard which rendered the ladder insecure."

Scarlett v. Atchison, supra.

III.

NO PRESUMPTION OF APPROVAL BY THE INTERSTATE COMMERCE COMMISSION OF THIS TYPE OF LADDER WITH BRACE ROD OBSTRUCTION, ARISES BY REASON OF FAILURE OF THE COMMISSION TO ENACT REGULATIONS FORBIDDING THE SAME.

It is contended by petitioner, that it is entitled to a legal presumption that the Interstate Commerce Commission acquiesced in the use of the brace rod in question as a part of the side ladder. Neither the facts nor the law sustain such a contention. In the first place, it is fundamental that custom will not justify a violation of a statute of this type, to-wit, one enacted for purposes of safety, such as the Safety Appliance Act. "Custom will not justify a violation of the Safety Appliance Act." *U. S. v. Chicago, St. Paul & O. R. R.*, 43 Fed. (2d) 300. Furthermore the evidence shows petitioner is the only railroad using this type of novel brace rod, extending out into the air, between the wall of the car and the ladder stiles, all other railroads using a flat rod flush with the side wall of the car. Justice will not countenance the establishment of a custom by the petitioner alone, thereby resulting in an escape from liability of the very mischief intended to be prevented by the Statute, particularly in the face of the testimony of petitioner's engineer that there are many ways of achieving the same bracing effect, without using this particular type of brace rod. (R. 48.)

This Court said in *Great Western R. R. v. Donaldson*, 246 U. S. 121; 62 L. ed. 616,

"nor can we agree with the contention of the plaintiff in error, that so long as the large button head had not been disapproved by the government inspector, such fact is conclusive of the sufficiency of the type in use. *We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of §2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the Federal Boiler inspector.*"

IV.

THE LADDER REGULATIONS OF THE COMMISSION DID NOT COVER THE UNSAFE FEATURES OF THIS LADDER, AND, EVEN IF APPLICABLE, WERE VIOLATED BY THE PETITIONER.

Petitioner contends that the only question involved in this case is one of clearance, specified by the regulations to be "minimum clearance of treads 2, preferably 2½ inches." Petitioner says the inner surface of the treads was 2½ inches from the outer surface of the rod, and therefore that ends the matter. The regulations of the Commission established under its order of March 13, 1911, page 5, with reference to ladders, contain no provisions with respect to obstructions of any kind in and about or within the ladder. The regulations are also silent as to clearance of the ladder with respect to the *stiles or uprights* of the ladder. The regulations are also silent with respect to any

clearance as between the side wall of the car and the verticle plane between the treads.

In other words, a tread itself, under the regulations, might have a clearance of 2½ inches, and yet there might be protrusions from the side wall of the car, extending outward and reaching the verticle plane between the treads, concerning which subject matter, no regulation of the Commission exists.

It is important to remember that the evidence here shows that respondent was injured, *not* while placing his foot on one of the treads, but when his foot came in contact with the brace rod obstruction *between* treads.

In addition, an examination of plaintiff's Exhibit No. 3 (R. 174) discloses that the uprights or stiles supporting the treads, were of substantial width and that the treads themselves were affixed to the *outer* edges of the *uprights* and extended somewhat outward from the outer surface of the uprights. Therefore, although the *inner* surface of the *treads* was 2½ inches from the *outer* surface of the diagonal brace *rod*, nevertheless the diagonal brace *rod* was almost flush with the *inner* surface of the *uprights*. So that there was practically no clearance at all between the outer surface of the diagonal brace *rod* and the inner surface of the *uprights*. There is no regulation of the Commission respecting the clearance of the uprights or stiles and we have here then, an obstruction between the uprights or stiles, and the side wall of the car,

governed by no clearance regulation of the Commission.

Assuming, however, for the sake of argument that the regulations of the Commission did apply with respect to the brace rod in question, then it could only be upon the theory that the brace rod was an additional tread, extending in a diagonal direction, and if this be the fact, then it would be clearly violative of the Commission's regulation with respect to clearance.

It is therefore clear that assuming that this brace rod was an obstruction in and about the ladder, there was no regulation of the Interstate Commerce Commission covering such obstruction. Petitioner, however, is insistent upon the argument that this particular brace rod is governed by the rules of the Interstate Commerce Commission. The only possible theory upon which these rules can be held to cover this type of construction, is that in effect and in the use of this ladder, the brace rod, constructed in practically the same plane as the ladder, was an additional tread, having the wrong clearance, the wrong angle, and the wrong space between itself and the other treads, in violation of all the rules adopted by the Commission. Petitioner is therefore faced with this dilemma. Either this ladder was unsafe in a respect *not* covered by any rule or regulation of the Commission, or it was unsafe and violated many of the rules and regulations of the Commission relating to ladders. In either phase, petitioner cannot escape liability for a trap such as it here main-

tained for its unwary brakeman, in violation of Section 2 of the Act.

On this same subject we call the Court's attention to Plate C, attached to and made a part of the Commission's Regulations under its order of March 13, 1911, a copy of which plate is reproduced opposite this page. It appears from Plate C, that the side ladder of a box car is required to be fastened to a clear and unobstructed verticle plane, with no obstruction between. One of two things must therefore be true. Either there is an admitted violation of Plate C, if it requires a clear unobstructed plane back of all the treads and uprights of the ladder, or if Plate C does not so require, then the Commission has not covered the whole field of safety required by the statute, in which event under the fundamental requirement of Section 2 of the Act, the question of fact remained as to whether or not the ladder was secure. (This fact the jury decided in favor of respondent.)

Considerable space is devoted by petitioner in its brief to the plea that the Safety Appliance Act should be construed in the light of practical railroad operations. In effect, petitioner says that anything its engineers determine to be practical, should be followed.

Certainly we agree that the Safety Appliance Act should be construed in the light of practical railroad operations. The record here shows, if we are to consider "practical railroad operations," that the other railroad companies in the United States have installed a type of flat brace rod which does not protrude from

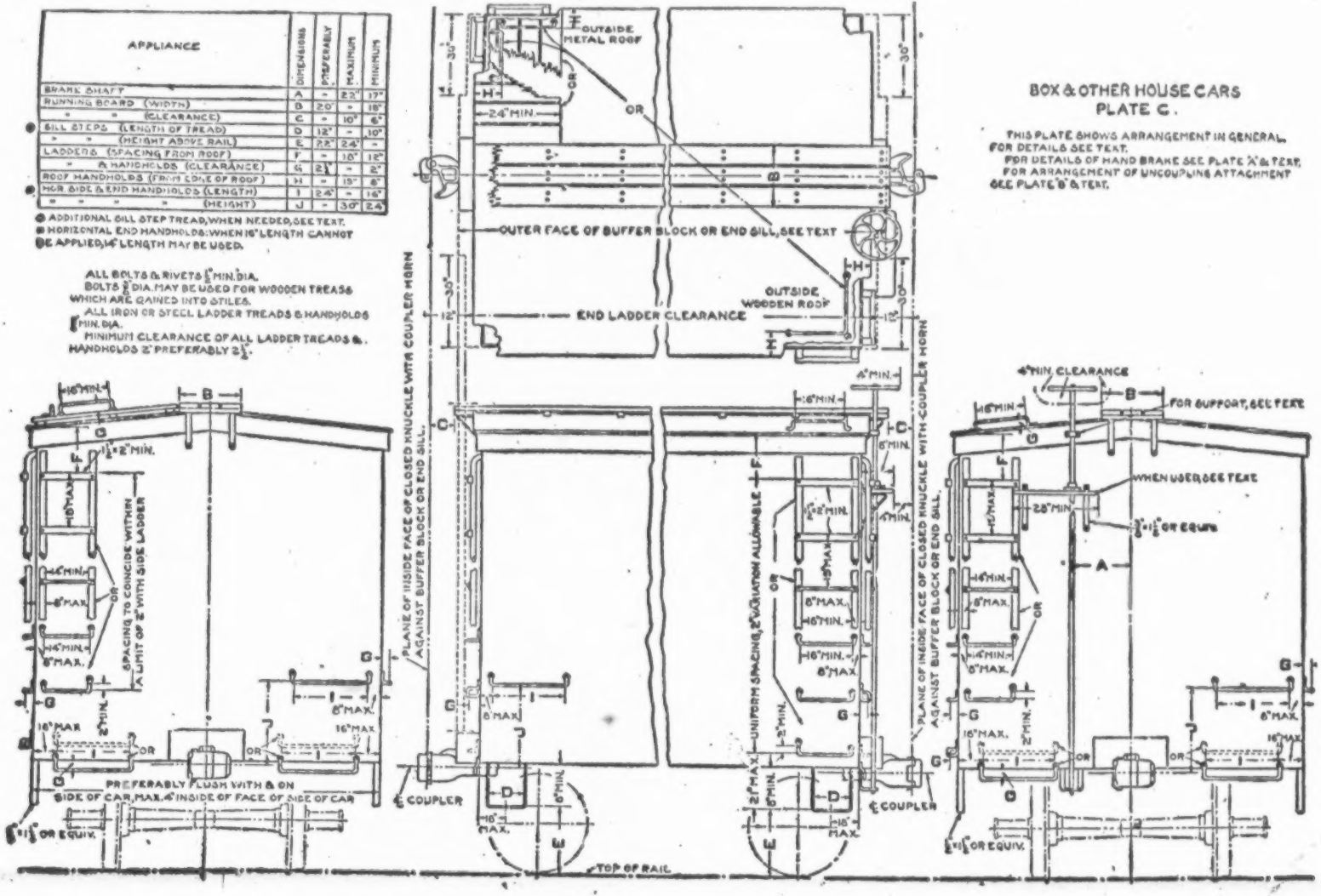
BOX & OTHER HOUSE CARS
PLATE C.

THIS PLATE SHOWS ARRANGEMENT IN GENERAL.
FOR DETAILS SEE TEXT.
FOR DETAILS OF HAND BRAKE SEE PLATE 'A' & TEXT.
FOR ARRANGEMENT OF UNCOUPLING ATTACHMENT SEE PLATE 'B' & TEXT.

APPLIANCE	DIMENSIONS	PREFERABLY	MAXIMUM	MINIMUM
BRAKE SHAFT	A	-	22"	17"
RUNNING BOARD (WIDTH)	B	20"	-	18"
" " (CLEARANCE)	C	-	10"	6"
● SILL STEPS (LENGTH OF TREAD)	D	12"	-	10"
" " (HEIGHT ABOVE RAIL)	E	22"	24"	-
LADDERS (SPACING FROM ROOF)	F	-	16"	12"
" & HANDHOLDS (CLEARANCE)	G	2½"	-	2"
ROOF HANDHOLDS (FROM EDGE OF ROOF)	H	-	19"	6"
● HOR. SIDE & END HANDHOLDS (LENGTH)	I	24"	-	16"
" " " " (HEIGHT)	J	-	30"	24"

● ADDITIONAL SILL STEP TREAD, WHEN NEEDED, SEE TEXT.
● HORIZONTAL END HANDHOLDS: WHEN 16" LENGTH CANNOT BE APPLIED, 14" LENGTH MAY BE USED.

ALL BOLTS & RIVETS ⅝" MIN. DIA.
BOLTS ½" DIA. MAY BE USED FOR WOODEN TREADS WHICH ARE GAINED INTO STILES.
ALL IRON OR STEEL LADDER TREADS & HANDHOLDS ⅝" MIN. DIA.
MINIMUM CLEARANCE OF ALL LADDER TREADS & HANDHOLDS 2" PREFERABLY 2½".


OUTSIDE METAL ROOF
OR
24" MIN.
OUTER FACE OF BUFFER BLOCK OR END SILL, SEE TEXT
OUTSIDE WOODEN ROOF
END LADDER CLEARANCE
PLANE OF INSIDE FACE OF CLOSED KNUCKLE WITH COUPLER HORN AGAINST BUFFER BLOCK OR END SILL.
SPACING TO COINCIDE WITHIN A LIMIT OF 2" WITH SIDE LADDER
PREFERABLY FLUSH WITH & ON SIDE OF CAR, MAX. 4" INSIDE OF FACE OF SIDE OF CAR
UNIFORM SPACING, ⅝" VARIATION ALLOWABLE
4" MIN. CLEARANCE
FOR SUPPORT, SEE TEXT
WHEN USED, SEE TEXT
COUPLER
TOP OF RAIL

the side wall of the car and obviously does not interfere with the safe use of the ladder. It follows therefore that no practical requirement of railroad operations has estopped petitioner from doing likewise. Had it done so, it would not be here defending itself. Certainly the statement of an employee of petitioner, that he had never heard of any employee previously having suffered any injury, because of this type of construction, dilated upon as it has been by petitioner in its brief, should not have any persuasive effect upon this Court, in the light of "practical railroad operations." On this subject, the California Supreme Court said:

> "We see no room for complaint on the ground that this holding has not been rendered in the light of practical railroad operation. The record shows plainly that many types of bracing other than the round rod installed in the manner here shown, are used by various railroads."

We submit that the real basis of petitioner's "practical railroad operations" plea is their "off the record" argument and bewailment, as to the cost of properly re-equipping some of their box cars. On this subject the California Supreme Court had this to say:

> "Appellant's plea of the exigencies of the situation, in that re-equipment of its cars with a different type of bracing would work a great hardship upon it and necessitate the expenditure of a vast sum of money, of course relates to matters outside the record of this case. But even so, safety of employees, and not the financial problem, is the primary consideration. If a round diagonally-installed brace rod does constitute a dangerous trap

and hazard in use of the side ladder, it should be eliminated."

It is respectfully submitted that this case involves a violation of the Safety Appliance Act, correctly determined on the facts by the jury, and that the judgment of the Supreme Court of California, should be affirmed.

Dated, San Francisco,
February 15, 1937.

HERMAN A. BACHRACK,
Attorney for Respondent.

LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
CLIFTON HILDEBRAND,
JAMES F. HOEY,
Of Counsel.